

GHOBYAL (Migration) [2019] AATA 6224 (25 October 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Abdmariam Boushra Welsson GHOBRYAL
VISA APPLICANT:	Mrs Marian Nasser Abdelmishah SELWANS
CASE NUMBER:	1724003
DIBP REFERENCE(S):	BCC2016/3213541
MEMBER:	Meena Sripathy
DATE:	25 October 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations

Statement made on 25 October 2019 at 12:16pm

CATCHWORDS

MIGRATION – refusal – Partner (Provisional) (Class UF) visa - subclass 309 – genuine and continuing relationship– applicant have a child together – strong evidence of their commitment to each other – separation causes him deep distress – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65, 417

Migration Regulations 1994, rr 1.03, 1.15, Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 27 September 2017 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 27 September 2016 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2)(a) because the delegate was not satisfied that she was the spouse of the sponsoring partner on the basis of the evidence provided with the application.
4. The review applicant appeared before the Tribunal on 23 October 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant by telephone. The review applicant was represented in relation to the review by his registered migration agent.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. *Evidence before the Department*

7. The visa applicant is a 27 year old Egyptian national, born and residing in Matay Menia, Egypt. She has parents, three brothers and a sister all residing in Egypt. She is sponsored by the review applicant who is a 34 year old Australian permanent resident, also born in Matay Egypt. He has parents and three siblings residing in Egypt and a brother who lives in the USA. The parties met in April 2010, and committed to a long term relationship one month later. They married on 29 July 2012. Neither declared any previous relationships. As at the time of application they had lived separately since October 2012 because the sponsor returned to Australia for his study and work.
8. The visa applicant was interviewed by an officer of the Department on 14 November 2016, and notes of this interview are included in the Department file. During the interview she told the officer she had never been refused a visa to any country including Australia. She was asked, and answered, questions about the sponsor and their relationship and stated that they had never been separated at any time.
9. On 4 June 2017, the applicant was invited to respond to information obtained by the Department that, contrary to her response at the interview, she had applied for a Visitor Visa for Australia on 9 March 2015 and in that application she indicated her marital status as "separated". On 13 June 2017 the visa applicant provided a declaration explaining that she had no knowledge about the visa application purportedly made by her and explaining the circumstances in which she sought advice about this. The sponsor also provided a Statutory Declaration confirming this explanation.

10. Also included in the Department file is evidence of the grant to the sponsor of a permanent visa on 4 August 2016 following a successful request for Ministerial intervention under s417 of the Act, visa applicant's Birth Certificate, Graduation Certificate dated 24 December 2013 relating to completion of a Bachelor of Arts , sponsor's Birth Certificate, Record of Betrothal on 12 July 2012, copy of Marriage Entry and Marriage Certificate relating to marriage on 29 July 2012, and Statements of relationship. The Statement of Relationship indicates the parties are relatives and know each other since childhood. The sponsor is the cousin of the visa applicant's father. They met for the first time to examine their intention to marry in April 2010 when the sponsor was visiting Egypt from Australia. They were betrothed on 12 July 2012 and married on 29 July 2012. The sponsor stayed in Egypt with the applicant until October 2012 when he returned to Australia. He sends her money to support her needs. They communicate daily when the sponsor returned to Australia.
11. The applicant provided a completed Form 80, two Form 888 Statutory Declarations from close friends of the applicants, evidence of money transfers from 2010-2015 amounting to approximately AUD\$35,000.
12. The delegate refused the application on 27 September 2017 on the basis of insufficient evidence to support a genuine and continuing spousal relationship, citing concerns about the contradictory evidence relating to the 2015 visitor visa application and lack of evidence of contact between the parties since 2012.

13. Evidence before the Tribunal

14. On 18 February 2018, the review applicant provided the following additional evidence in support of the application: evidence of visa and review applicant's travel to Thailand in December 2017 to January 2018, hotel receipts, evidence of a positive pregnancy test from Pattaya Memorial Hospital and photos of the couple.
15. On 18 June 2019 the review applicant provided the following evidence: Birth Certificate of a child of the relationship, Matthew, born 27 August 2018, Viber chat and call history records of communication between them, photos of the couple, evidence of money transfers amounting to approximately AUD\$7000.00 for periods between 2017-2019, receipts of travel to Thailand in 2017-2018.
16. On 18 October 2019 the review applicant submitted statements from himself and the visa applicant addressing the matter of the 2015 Visitor visa application, further evidence of a recent money transfer of AUD\$1400.00 and a hospital discharge report relating to the review applicant, indicating a diagnosis of depression and anxiety, submitted to be due to prolonged separation from his wife and child.
17. The review applicant appeared before the Tribunal on 23 October 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant by telephone. The Tribunal took evidence from the review applicant in the absence of the visa applicant, and subsequently from the visa applicant, in his presence. Their evidence was substantially consistent and given in a straightforward and direct manner. The Tribunal found their evidence to be credible, authentic and consistent with documentary evidence before it, and accepts it on that basis. As relevant, details of their evidence are elaborated on in the discussion below.

Whether the parties are in a spouse or de facto relationship

18. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the

present case the visa applicant claims to be the spouse of the review applicant who is an Australian permanent resident.

19. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

20. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The Tribunal notes from the Department file that evidence of engagement and wedding photo albums, CDs and studio photos of the couple were sighted at the Departmental interview. Although this evidence was not before the Tribunal, it is not disputed and on this basis the Tribunal accepts it was presented. The Tribunal has before it documentary evidence including record of Betrothal, Marriage, Entry of Marriage and Marriage Contract and the parties gave consistent oral evidence to the Tribunal about their family relationship and the circumstances of their engagement and marriage. On this evidence, the Tribunal accepts the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

21. The review applicant and visa applicant gave evidence to the Tribunal at hearing about the inception and development of the relationship, their living and financial arrangements, social aspects and nature of their commitment to each other. Their oral evidence was substantially consistent, and broadly consistent with previously given oral and written evidence. The Tribunal has also considered documentary evidence before it, relating to financial transfers from 2010 to date, their travel to Thailand in 2017, the pregnancy in January 2018 and the birth of their child, Mathew in August 2018.
22. Below, it makes the findings addressing the matters referred to in r.1.15A(3), on which its assessment of the relationship and conclusions are based.

23. *Financial aspects of the relationship*

24. Given that the applicants are living, and have always lived, in different countries, the Tribunal places less weight on this aspect of the relationship, as it is not reasonable to expect them at this stage to have joint ownership of real estate or other major assets, joint liabilities, or owe legal obligations in respect of each other. On the evidence of the parties, it accepts that the visa applicant initially lived with the review applicant's family, and prior to the birth of their child, was working at the Church monastery as a Sunday school teacher. Therefore her reliance for financial support on the review applicant was minimal. Despite this, the review applicant told the Tribunal he considers it his responsibility to support the visa applicant regardless of her need for it. The visa applicant confirmed that he sends her money. The parties gave consistent oral evidence that he has sent the money to his father, or brother, via their bank accounts, and they provide it in cash to the visa applicant. The review applicant

told the Tribunal they purchased furniture for his family apartment. Evidence of substantial and regular financial transfers from 2010 to date has been provided.

25. The Tribunal accepts on all of this evidence that the review applicant has regularly and consistently sent money for the visa applicant's personal needs since 2010 and is satisfied that the financial aspects of the relationship are, in the circumstances, consistent with a genuine spousal relationship.

26. *Nature of the household*

27. As the parties live in different countries they are not currently living together, and have only lived together for the short periods of time they have been in the same country, being July to October 2012 and December 2017 to January 2018 when they met in Thailand for a holiday. It accepts that the visa applicant became pregnant in Thailand in January 2018 and gave birth to their child, Matthew in August 2018 in Egypt. The review applicant spoke of his intense sadness and desperation in not being able to be present for the birth of his son or more recently for his first birthday celebration. He sends money for his support and is in daily contact with the visa applicant and his son by phone and internet. The Tribunal accepts Matthew is a child of the relationship and that the parties have joint responsibility for care and support of their child, despite not living together to date. The Tribunal accepts the visa applicant and their son presently live with the visa applicant's parents and siblings, and that prior to the pregnancy, she lived with the review applicant's parents.
28. The Tribunal accepts the review and visa applicant have lived together following their marriage when the review applicant was last in Egypt in 2012, and again for the period of their holiday in Thailand in 2018 and that they plan to live together when the visa applicant comes to Australia and that this is consistent with a genuine spousal relationship.

29. *Social aspects of the relationship*

30. The Tribunal accepts that the review applicant and visa applicant are related to each other, as the review applicant is the cousin of the visa applicant's father. They gave evidence demonstrating their knowledge of, and contact with, other's family members and stated that each are well regarded by the other's family. The Tribunal accepts the parties holidayed together in Thailand in 2018. It discussed with the review applicant at the hearing why they did not meet up prior to December 2017, given the length of time since they were together in October 2012. In response the review applicant explained that he was unable to leave Australia from 2012 to 2016 due to his visa status and that he was pursuing his residency application. He referred to the nature of the application for permanent residency that he made following his return from Egypt in 2012, and that for these reasons he was unable to return there. He also explained that after finally being granted permanent residence in 2016, he immediately lodged the visa applicant's application for a Partner visa and believed (based on the experiences of other people he knew) it would be granted soon, given the length of their marriage. For this reason they decided not to spend money on meeting in a third country at that time, but rather to save for their future life in Australia. When the Department refused the application in September 2017, they arranged to meet in Thailand. After this visit, the visa applicant became pregnant and later had the baby and she was advised against travelling. The review applicant told the Tribunal that he could not travel to Egypt because of his ongoing fears of return there.
31. The Tribunal has considered the review applicant's explanations and evidence and notes that the fact he has not returned to date, for the birth of his son or other significant celebrations such as christening and first birthday, is consistent with, and supports, the credibility of his claimed fears. He told the Tribunal of his depression and frustration at the prolonged separation from his family that recently led him to self harm, and resulted in a

hospital admission. The Tribunal accepts on this evidence that the separation causes him deep distress and is not by choice.

32. *Nature of persons' commitment to each other*

33. Although known to each other as family, the review applicant met the visa applicant as an adult when he returned to Egypt from a visit in 2010. At this time he discussed his desire to marry her with his father and family and subsequently they were engaged. When he returned to Australia they were in contact by phone and internet to get to know each other more, and in 2012, the review applicant returned to Egypt and they married. The Tribunal accepts they are related as claimed and the marriage is fully supported by their families. It accepts the limited period they have lived together is due to the circumstances of them living in different countries. It accepts they now have a child together, and this is strong evidence of their commitment to each other. They each gave evidence that they are in regular contact with each other by phone and video calls when they are apart and talk about regular daily activities and future plans. The visa applicant's knowledge of the review applicant's circumstances and living arrangements in Australia supports that they talk to each other at some level of detail and share aspects of their lives with each other. She was aware of his recent hospitalisation and reasons for his distress. The Tribunal accepts that the review applicant is genuinely and deeply distressed because of the prolonged separation from his wife and child. The circumstances of his recent hospitalisation evidences and supports this.
34. The Tribunal accepts that the applicants have a mutual commitment and see the relationship as long term.

35. *Other circumstances/matters*

36. The Tribunal has considered the concerns raised by the delegate in her decision regarding the visa applicant's application for a Visitor Visa in 2015 and the inconsistent information indicating that she had declared her marital status as separated at that time and her failure to refer to this at the interview or in her application. In providing the Department file BCC2016/3213541 to the Tribunal, a copy of this Visitor Visa application was not provided. The only reference to this information appears in ISCE notes: "*Applicant also indicated she is separated*". The visa applicant has consistently denied knowledge of making this Visitor visa application or stating her relationship status as separated. She provided an explanation of the circumstances in which this may have occurred. In the absence of the Visitor visa application forms before it, and given the consistent and adamant explanations of the visa applicant and the passage of time and recent birth of the couple's child, this matter is not of great relevance or significance to the Tribunal in its consideration of the genuineness of the relationship between the applicants at time of application (September 2016) or now. In any event, the Tribunal accepts, on the evidence of the visa and review applicants that they have never been separated since their marriage in 2012.
37. The Tribunal also accepts the review applicant's explanation provided for the long period (2002-2017) between visits with each other in light of the evidence before it, including information about his own migration history.

38. *Conclusions*

39. On the basis of the findings above and all of the evidence before it, the Tribunal is satisfied the review and visa applicants have a mutual commitment to shared life to the exclusion of others; are in a genuine and continuing relationship; and while not living together, are not living separately and apart on a permanent basis.

40. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
41. Therefore the visa applicant meets cl.309.211 and cl.309.221.
42. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

43. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309. of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations

Meena Sripathy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).